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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOHNATHAN DAVID MC NAIR, Defendant and Appellant.	B144048 (Los Angeles County Super. Ct. No. MA019020)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol S. Koppel, Judge. Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Marc E. Turchin, Acting Senior Assistant Attorney General, Robert F. Katz, Supervising Deputy Attorney General, and David C. Cook, Deputy Attorney General, for Plaintiff and Respondent.

Johnathan McNair appeals from the judgment entered following a jury trial in which he was convicted of shooting at an unoccupied vehicle (Pen. Code, § 247, subd. (b) [further section references are to the Pen. Code]) and shooting at an inhabited dwelling (§ 246), with findings as to the latter offense, among others, that he personally inflicted great bodily injury (§ 12022.7) and personally and intentionally discharged a firearm and proximately caused great bodily injury (§ 12022.53, subd. (d)). Defendant contends that the trial court prejudicially erred in instructing the jury pursuant to CALJIC No. 17.41.1 and that his enhancement of 25 years to life under section 12022.53, subdivision (d), constitutes cruel and unusual punishment.[1] We affirm.

FACTS

On the evening of August 13, 1999, defendant attended a party at a trailer park in Lancaster. Earlier that day, Joseph Gibson had told defendant not to come to the party. Gibson said this because Jerry Dalrymple would be there, and Gibson knew that defendant and Dalrymple had been fighting. (Defendant lived with Dalrymple and Dalrymple's mother.) Defendant nonetheless came to the party. The people there were drinking heavily. Defendant got into an altercation with Dalrymple and others. Defendant thereafter left to get a gun. He returned several hours later and put the gun under the skirt of one of the trailers.

Although the record is unclear as to the exact sequence of events, at one point after defendant returned he retrieved his gun from the trailer and, from a position outside the trailer where the party was being held, started firing. Gibson, who was inside the trailer, heard four of five gunshots. A bullet went through the trailer and hit Gibson in the thigh. Gibson went to the hospital to have the wound treated. He was released after a couple of hours, but needed to use crutches for about a month afterward.

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[1] We note that at a hearing held on July 16, 2001, a lower term sentence of three years was imposed for shooting at an inhabited dwelling, and sentence for shooting at an unoccupied vehicle was stayed pursuant to Penal Code section 654.

The police were called to the scene and determined that there were two bullet holes in the trailer and at least one in an adjacent car, which belonged to Dalrymple. The rear windshield of the car had also been shattered. The gun used by defendant contained two live rounds and four expended rounds. It was an older model, and in order to be fired, the shooter was required to cock the hammer manually and then squeeze the trigger. That process, called "fanning," had to be repeated for each shot. In an interview with the police conducted at the scene, defendant stated that he shot at the car because he was drunk, had a bad temper, and was angry. Defendant denied having shot in the direction of the trailer where Gibson was hit.[2]

In defense, a firearms expert who analyzed the trajectory of the bullets was of the opinion that the shooter was moving when the shots were being fired. A bullet recovered from the trailer had entered while spinning end over end. This can happen when a bullet ricochets off another object. The bullet in the trailer had white paint on it, indicating that it had passed through an object that had white paint. Dalrymple's car was white. However, despite several attempts, the expert was not able to inspect the car.

DISCUSSION

1. CALJIC No. 17.41.1

CALJIC No. 17.41.1, with which defendant's jury was instructed, provides: "The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation." Defendant argues that the instruction constituted reversible error because it chilled the jury's deliberative process and impermissibly infringed on the jury's ability to engage in nullification.

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[2] Defendant was acquitted of charges of attempted murder of Gibson and Dalrymple.

As recently noted by the Supreme Court in *People v. Williams* (2001) 25 Cal.4th 441, 446, footnote 3, the validity of CALJIC No. 17.41.1 is pending before that court in several cases, including *People v. Engelman* (2000) 77 Cal.App.4th 1297, review granted April 4, 2000, S086462. Nonetheless, under the circumstances of this case, we need not speculate as to whether the instruction had the effect claimed by defendant. The instant record reveals that there was no jury deadlock, there were no holdout jurors, and there was no evidence that any juror refused to follow the law. In other words, there was no indication that the use of CALJIC No. 17.41.1 affected the verdict in any way. Accordingly, even if CALJIC No. 17.41.1 is ultimately found to be improper, reversal would not be required regardless of the standard of prejudice employed. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Molina* (2000) 82 Cal.App.4th 1329, 1334–1336.)

2. Cruel and Unusual Punishment

The finding that defendant personally and intentionally discharged a firearm and proximately caused great bodily injury required imposition of a sentence enhancement of 25 years to life under section 12022.53, subdivision (d).[3] Defendant filed a written motion to strike the enhancement on the ground that its application to this case would constitute cruel and unusual punishment under the state and federal constitutions. At the sentencing hearing, the court and counsel discussed the facts of the case, as well as defendant's background. The court took special note of evidence that defendant "just didn't take out a gun. . . . [H]e went away and got a gun, and he came back with it. I

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[3] Section 12022.53, subdivision (d), provides that, "[n]otwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, and who in the commission of that felony intentionally and personally discharged a firearm and proximately caused great bodily injury, as defined in Section 12022.7, or death, . . . shall be punished by a term of imprisonment of 25 years to life in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."

think that's an important fact in this case." The probation officer's report prepared for sentencing stated that defendant was born in 1975. A juvenile petition for burglary was sustained against him in 1989, and a petition for vandalism was sustained in 1992. As an adult, defendant had been convicted of petty theft in 1994 and had been convicted of vandalism in 1999, for which he was on probation at the time of the current offense.

Defendant's motion was denied. On appeal, we reject his contention that the sentence of 25 years to life that he received pursuant to section 12022.53, subdivision (d), constitutes cruel or unusual punishment under the United States and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.)

In rejecting a similar claim, the court in *People v. Martinez* (1999) 76 Cal.App.4th 489, 494, stated that in *Harmelin v. Michigan* (1991) 501 U.S. 957, "a majority of the [United States Supreme Court] held that a state mandatory sentence of life without possibility of parole for possession of substantial amounts of cocaine did not constitute cruel and unusual punishment under the federal Constitution." The *Martinez* court continued: "Under the California Constitution, a sentence may be cruel or unusual if it is 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424 [].) The main technique of analysis under California law is to consider the nature both of the offense and of the offender. (*People v. Dillon* (1983) 34 Cal.3d 441, 479 [].) The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.]

"The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.] Only in the rarest of cases could a court declare that

the length of a sentence mandated by the Legislature is unconstitutionally excessive. [Citations.]" (*People v. Martinez, supra,* 76 Cal.App.4th at p. 494.)

The *Martinez* court went on to determine that section 12022.53 "represents a careful gradation by the Legislature of the consequences of gun use" and is "limited . . . to convictions of very serious felonies." (*People v. Martinez, supra,* 76 Cal.App.4th at p. 495.) "The fact that subdivision (d) leaves no additional room for trial court discretion based on different gradations of great bodily injury does not render the punishment cruel or unusual." (*Ibid*.) "[T]he Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly than the same crimes committed by other means, in order to deter the use of firearms and save lives. [Citations.]" (*Id.* at pp. 497–498.)

The defendant in *Martinez* was convicted of the attempted murder of a store owner who had told the defendant to leave the store. (*People v. Martinez, supra,* 76 Cal.App.4th at p. 492.) The defendant was 23 years old at the time and his criminal history consisted of a single conviction for driving without a license. (*Id*. at p. 496.) There was no evidence that the defendant was unusually immature, either intellectually or emotionally. (*Id*. at p. 497.) The *Martinez* court found that under those circumstances, imposition of a 25-year-to-life enhancement under section 12022.53, subdivision (d), did not violate the state or federal constitutions. (*Id*. at p. 497; see also *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1212–1216; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 16–19; *People v. Perez* (2001) 86 Cal.App.4th 675, 678–680.)

Defendant does not contend that *Martinez* was incorrectly decided, but asserts that his case is "readily distinguishable from *Martinez*." We fail to see how. Despite his acquittal for the attempted murder of Gibson and Dalrymple, defendant did not demonstrate that he did not shoot at the trailer in which Gibson was hit. Moreover, the

trial court felt it significant that after the initial altercation, defendant left the party in order to retrieve his gun. Consideration of the facts of this case and of defendant's background supported imposition of the 25-year-to-life enhancement of section 12022.53, subdivision (d).

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, J.

We concur:

SPENCER, P. J.

ORTEGA, J.